

MICHIGAN CRIMINAL LAW

ANNUAL JOURNAL

Vol. I, No. 1

2002

30th Anniversary Year

The *Michigan Criminal Law Annual Journal* is the official journal of the Criminal Law Section of the State Bar of Michigan. This *Journal* is the first annual journal of the Section, in keeping with the Section's mission statement, is a significant addition to the Section's extensive program of publications, seminars, conferences, legislative liaison and other activities of the Section for the professional development and education of its members and the Bar.

The Criminal Law Section encourages interested members of the Bar and legal community to contribute articles of interest to criminal law practitioners to further and improve the practice of criminal law in the State of Michigan. Submissions and manuscripts are reviewed by attorneys experienced in the subject matter covered.



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Implications and Illumination of MRE 404(b) Other Acts Evidence

“The law hath not been dead, though it hath slept.”
Shakespeare—*Measure for Measure*, Act II, Sc. 2.

By William M. Worden, Sr. Assistant Prosecuting Attorney, Eaton County, Michigan

Other acts evidence is alive and well in Michigan. A plethora of recent opinions, both published and unpublished, support this conclusion. Until recently, some lawyers considered MRE 404(b) as a rule of exclusion. That thinking should take a 180-degree turn in light of recent court decisions.

Among those recent decisions is *People v Martzke*, wherein the Court of Appeals included the salient facts and set forth the law in a thoughtful, articulate manner that provides a guidepost for trial courts to follow regarding Rule 404(b) evidence. In *Martzke*, the defendant, a day-care provider, was charged with child abuse in the first degree. The prosecution sought to introduce other acts evidence of suspicious injuries that appeared on two other infants and one toddler while they were in the defendant’s exclusive care. The trial court granted defendant’s motion to suppress on the ground that such evidence was impermissible character evidence precluded by MRE 404(b). The Court of Appeals reversed and remanded for further development of the record.

The only defense submitted in *Martzke* was a *general denial*. Implicit in this position is the underlying suggestion that *someone else is responsible* for the infant’s injuries. The *Martzke* panel cited Supreme Court precedent for the legal proposition that no judge can be expected to correctly assess the evidentiary issue unless and *until the court is presented with a concrete theory of defense* that allows the judge to determine relevancy. Without such a concrete presentation, a defendant’s general denial requires the trial judge to *assume the relevancy of other acts proffered under noncharacter theories of admissibility*.

The *Martzke* decision provides an excellent primer on Rule 404(b) evidence. First, the *Martzke* Court noted, MRE 404(b) is a *rule of inclusion*, allowing other acts evidence as long as it is not being admitted *solely* to demonstrate criminal propensity. Citing *People v Crawford*, the defense attorney in *Martzke* argued that MRE 404(b) is a rule of exclusion. It is true that the *Crawford* Court wrote: “The fundamental principle of exclusion, codified by MRE 404(b), is woven into the fabric of Michigan jurisprudence”

However, as the *VanderVliet* Court explained, MRE 404(b), “is actually a rule of inclusion rather than exclusion, since only one use is forbidden and several permissible uses of such evidence are identified.”

In *VanderVliet*, the Michigan Supreme Court adopted the four-step process described in *Huddleston v United States*, to determine whether other acts evidence is admissible under MRE 404(b). First, the evidence must be relevant to a proper purpose under MRE 404(b) and must not be offered to show propensity. The list of purposes for admission of other acts evidence within MCR 404(b) is illustrative, not exhaustive. Second, it must also be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact or consequence at trial. Third, the trial judge must balance the evidence to insure that the probative value of the proffered evidence is not substantially outweighed by unfair prejudice under MRE 403. Fourth, the trial court, upon request, may provide a limiting instruction under MRE 105.

On its face, Rule 404 limits only one category of logically relevant evidence. If the prosecution’s only theory of relevance is that the other act shows defendant’s inclination to wrongdoing in general to prove that the defendant committed the conduct in question, the evidence is not admissible.

The *VanderVliet* Court diagrammed what it called “the forbidden theory of relevancy” in a footnote. Under “the forbidden theory of relevancy,” the defendant’s uncharged act is the evidence. The defendant’s subjective character is the intermediate inference. The defendant’s conduct in conformity with character is the ultimate inference.

MRE 404(b) permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct. The proffered evidence must be probative of something other than defendant’s propensity to commit the crime. Permissible uses of other acts evidence includes intent, identity, and absence of accident when they are material. Intent, identity, and absence of accident were the three “proper purposes” identified by the prosecution in *Martzke*.

The prosecutor must offer the other acts evidence under something other than a character to conduct theory. Evidence must be relevant to an issue other than propensity under Rule 404(b), to “protect against the introduction of extrinsic act evidence when that evidence is offered *solely* to prove character.”

In *Martzke*, the prosecution did not seek to introduce other acts evidence *solely* to prove defendant’s character. Instead, the prosecution sought to introduce evidence that

other children left within defendant's exclusive care also developed suspicious bruises, in part, to establish defendant's intent and absence of mistake.

The *Martzke* Court wrote: "[t]o be sure, evidence that other children left within defendant's exclusive care developed suspicious bruises may be relevant to whether defendant intentionally inflicted the victim's injuries or whether they resulted from accidents." The *Martzke* Court found it could not conclude, as the trial court had, that the purpose advanced by the prosecution for the admission of other acts evidence ran afoul of the proscriptions contained in MRE 404(b).

The next inquiry to determine admissibility of other acts evidence is whether the proffered evidence is relevant. "Logical relevance" is the touchstone of the admissibility of uncharged misconduct evidence. The concept of relevance is concerned with the relationship between the proffered evidence and a material fact at issue in the case. The evidence makes the material fact at issue more probable than it would be without the evidence. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence more probable or less probable than it would be without the evidence.

In *Martzke*, the defendant denied committing first-degree child abuse. When a defendant pleads not guilty, *all* elements that comprise the offense are placed "at issue." For defendant to be found guilty of first-degree child abuse, the prosecutor must establish, beyond a reasonable doubt, that defendant knowingly or intentionally caused serious physical or mental harm to a child.

The wording of the applicable statute, coupled with the defendant's not guilty plea, may render defendant's intent a material fact that is "at issue." Because defendant contends she did nothing at all to cause the victim's injuries, her intent and absence of mistake may become facts "at issue" *as the proceedings develop* and the defense theories solidify.

After assessing materiality and relevance, the third step in the analysis is to determine whether the potential for *unfair* prejudice *substantially* outweighs the probative value of the evidence. *Unfair prejudice* exists when there is a danger that the jury will give marginally probative evidence undue weight. The prosecution argued that the evidence in *Martzke* is not marginally probative; it establishes the ultimate inference, that defendant knowingly or intentionally, and not accidentally, engaged in physically abusive conduct.

The prosecution argued that this 404(b) evidence is powerfully, not marginally, probative of defendant's guilt. Thus, the danger of unfair prejudice cannot substantially outweigh the evidence's highly probative value. Also, the more probative the evidence, the less unfair it is. All relevant evidence is inherently prejudicial. The question is whether it is *unfairly* prejudicial, and whether that *unfair* prejudice *substantially* outweighs its probative value.

"Unfair prejudice" occurs where either "a probability

exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect," or "it would be inequitable to allow the proponent of the evidence to use it."

If the trial court ultimately determines that the probative value of the proffered evidence is not substantially outweighed by its potential for unfair prejudice, defendant is entitled to a carefully crafted limiting instruction. This limiting instruction must advise jurors that they are to consider the other acts evidence only as indicative of the reasons for which the evidence is proffered to cushion any prejudicial effect flowing from the evidence. A carefully constructed limiting instruction rendered by the trial court would be sufficient to counterbalance any potential for prejudice spawned by the other acts evidence.

Taking a "wait and see" approach is the preferred method of dealing with Rule 404(b) evidence. In *Sabin*, our Supreme Court urged trial courts to delay determining whether other acts evidence is admissible until the trial court has had the opportunity to view the proofs as they are actually presented at trial. By waiting to determine the admissibility of other acts evidence, the trial court is able to forestall gamesmanship by the parties and insure the admission of evidence that possesses significant probative value. The ultimate goal is an enlightened basis for the trial court's conclusion of relevance and the attendant inquiry under MRE 403.

Many of the recent Rule 404(b) cases involve child victims. In *People v Hine*, the Supreme Court reinstated the defendant's conviction. The Court of Appeals had reversed because of the admission of other acts evidence. Paramedics found a two-and-a-half-year-old girl who was not breathing, had no pulse, and appeared to be dead. After the child was officially pronounced dead, an autopsy revealed that she had several internal injuries, including a subdural hematoma, a healing tear of the liver, hemorrhage in the region of the pancreas, bleeding in the colon (near the appendix), and a large amount of fluid in the abdomen. She had numerous circular bruises on her abdomen and a bruise across the bridge of her nose. The injuries were of varying ages, from less than half a dozen hours up to five to seven days old. The cause of death was multiple blunt force injuries. Defendant had been the victim's sole care provider the week before her death while her mother was at work.

The prosecution called three witnesses to testify to defendant's physically abusive behavior towards them, some of it similar in terms of the specific injuries caused. The trial court ruled that the evidence was relevant to show who inflicted the injuries on the child and the intent with which they were done. The defendant offered "accident" as an explanation for several of the child's injuries. The evidence presented at the evidentiary hearing and at trial supported the trial court's conclusion that there was a common plan, scheme, or system in the defendant's assaults on the women and on the child. Thus, the trial

court did not abuse its discretion in determining that the assaults by the defendant on his former girlfriends and the charged offenses regarding the child victim shared sufficient common features to permit the inference of a plan, scheme, or system.

Like *Martzke* and *Hine*, lack of accident was the theory of admission in *People v Magyar*, a felony murder by child abuse case. In *Magyar*, the defendant's ex-wife testified that he had been previously charged with abusing her daughter. She testified regarding the abusive acts and defendant urging delay in treating the child's injuries. The Court of Appeals found the other acts evidence relevant to show that the child's injury was not the result of an accident. Because one could infer from these common features that the defendant had a common scheme to assault the female children of his girlfriends, the testimony was relevant and offered for a proper purpose.

The *Magyar* Court cited our Supreme Court's quoting of *Imwinkelried*, where a defendant's intent is an issue, "the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently." As our Supreme Court has observed, the man who wins the lottery once is envied; the one who wins it twice is investigated.

In *Katt*, the overall defense strategy was to paint the children's mother as a vengeful person who was attempting to frame defendant by persuading her son and daughter to lie about sexual abuse. Initially, the trial court in *Katt*, denied the prosecutor's motion to admit other acts evidence concerning an alleged sexual assault on another child. However, after the defendant testified, "it's not in my nature to go around and have sex with children," the trial court granted the prosecutor's renewed motion to introduce other acts evidence. The trial court observed that the evidence was proper rebuttal, and it read a cautionary instruction to the jury concerning the limited use of the evidence.

In *People v Milstead*, the evidence of other bad acts was admissible because it was connected with the crimes charged, and it was relevant to the defendant's theory of the case. The defendant was charged with conspiracy to commit murder, and a witness used by the police testified to the events. A videotape of a meeting was made, and during that meeting defendant, whom the witness was to pay to murder another witness, made statements of having committed past violence. The defense did not object. Defense counsel, as a matter of trial strategy, freely admitted defendant made fanciful claims about a violent past and characterized those comments as mere bravado, intended to obtain money by trickery. The Court of Appeals affirmed.

Finally, in *People v Kuhlman*, the Court of Appeals looked at the need for admission of other acts evidence to overcome a credibility problem. An Alger County Circuit Court jury convicted defendant of third-degree criminal sexual conduct. The victim was fourteen-years-old, and

defendant was twenty-three-years-old and employed by the City of Munising as a police officer.

The prosecutor gave notice before trial of the intent to use Rule 404(b) evidence that defendant engaged in flirtation and sexual innuendo in conversations with various teenage girls working with the victim at the local Dairy Queen. Defendant also engaged in sexual intercourse with one of the victim's co-workers around the same time as the alleged act with the victim, and he had sexual contact with other girls. In affirming the trial court's admission of Rule 404(b) evidence, the Court of Appeals wrote:

[W]e agree with the prosecutor that this evidence was properly admitted to establish the credibility of the victim and her claims. That is, by itself, a claim that defendant, an adult police officer, would engage in improper sexual contact with a fourteen year old, first by kissing her and feeling her breasts while they were golfing and later by engaging in sexual intercourse, would seem incredible. The credibility problem for the prosecutor is further exacerbated by the fact that the victim had a juvenile adjudication for making a false report of there being a bomb at her school.

However, the incident with the victim is placed in context by the evidence that defendant not only flirted with her, but with her co-workers at the Dairy Queen, including sexual innuendos involving an ice cream cone and references to his gun which were suggestive of his penis. Further, his act of inviting the victim into his house, offering her alcohol and then engaging in sexual intercourse was consistent with his conduct with the sixteen-year-old, and similar to activities with other girls which did not result in sexual intercourse.

While the *Kuhlman* decision is not precedentially binding under the rule of *stare decisis*, a court is free to find the reasoning of an unpublished case persuasive.

These recent court decisions involving Rule 404(b) evidence are representative of Michigan's approach to other acts evidence. Though inadmissible for one reason, a piece of evidence may nevertheless be admissible under other theories. These cases, and their predecessors, provide the framework for admission of other acts evidence.

William M. Worden works in Charlotte, Michigan as a Senior Assistant Prosecuting Attorney for Eaton County. He specializes in appellate advocacy. Previously, Mr. Worden worked in the private practice of law, and as a Circuit Court law clerk in Lapeer County. He graduated from Wayne State University (B.A.), and the Detroit College of Law (J.D.). Mr. Worden has served as a faculty member at conferences for appellate prosecutors in Michigan. He has also taught appellate advocacy at the National Advocacy Center in Columbia, South Carolina.

Notes